SUPREME COURT OF THE UNITED STATES.

No. 313.

CHARLES W. WEST AND JOSEPH TORRENCE, PLAINTIFFS IN ERROR,

vs.

THE CITY OF AURORA.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

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1 Pleas of the circuit court of the United States within and for the eighth judicial circuit and district of Indiana, begun, holden, and continued at the United States court-house in the city of Indianapolis, in said district, on the second day of May, in the year of our Lord one thousand eight hundred and sixty-five, before the honorable David Davis, an associate justice of the Supreme Court of the United States, and the honorable David McDonald, judge of the district court of the United States for the district of Indiana.

CHARLES W. WEST and JOSEPH TORRENCE
v.
THE CITY OF AURORA.

Be it remembered that, heretofore, to wit, on the twentieth day of December, one thousand eight hundred and sixty-four, the plaintiffs, by Messrs. Porter and Fishback, their attorneys, filed in the office of the clerk of the circuit court of the United States a transcript in the above-entitled cause from the Dearborn circuit court of the county of Dearborn, in the State of Indiana, which transcript reads in the words and figures following, to wit:

2 Pleas, &c., begun and held at the court-house in Lawrenceburg, in and for the county of Dearborn, in the State of Indiana, before the honorable Reuben D. Logan, judge of the 4th judicial circuit of the State of Indiana, of which the county of Dearborn forms a part, it being the October term of said court, in the year of Lord one thousand eight hundred and sixty-four.

CHARLES W. WEST and JOSEPH TORRENCE
v.
THE CITY OF AURORA.

Be it remembered, that on the 31 day of October, 1864, being the 1st judicial day of the October term of said court, in the year of our Lord one thousand eight hundred and sixy-four, the following proceedings were had in said cause, to wit:

Now comes the said City of Aurora, by her attorney, and moves the court for leave to file an amendment to her answer heretofore filed in said cause, that is to say, three additional paragraphs, which motion is sustained by the court, and leave is given to the said defendant to file such additional paragraphs to her answer, subject to the

3 payment of costs occasioned by such amendment; and the defendant now, in open court, files said amendment to her said answer, being paragraphs numbered 8, 9, and 10, to wit:

Additional paragraph filed by leave of court.

Dearborn circuit court.

CITY OF AURORA
ads.
CHARLES W. WEST *et al.*

And for a further and eighth answer to said complaint, the defendant says that, before the preparing of the bonds and coupons in the declaration mentioned, the city council of said city were re-

quested by a resolution of the directors of the Ohio and Mississippi Railroad Company, of which said West was one, and in which resolutions he joined, to deliver her bonds in payment of a subsciption of $50,000 of stock which one John D. Haynes, as mayor of said city had subscribed in the year 1850; that said railroad bonds were not then due under the said subscriptions; that the city council refused to give said bonds, unless the city would first sell and dispose of the stock which the council then supposed the city had subscribed for; that after various negotiations an arrangement was made by the city council with John Cobb, a director of said railroad company, and Oliver Cobb, by which they were to purchase $30,000 of the said stock, subject to the lien of the corresponding bondholders for the payment of $30,000 of the said bonds given in payment of the said stock and subject to the right of substitution of the bond-
4 holders for the corresponding stock at any time before a declaration of cash dividends should be made by the said railroad company, and also subject to the lien of the city upon the said stock for the payment of the same sum; that this arrangement was to be carried out by the issuing the said stock in certificates of one thousand dollars each, upon the face of which the said lien to the corresponding bondholder and said city for one thousand dollars of bonds, and said right of substitution was to be indorsed, and the said city council were to make a transfer of the said stock, and procure the certificates thereof, thus indorsed, and deliver them to the said Cobb, and the said Cobbs were thereupon to assume the payment of the interest upon the $30,000 of bonds named in the complaint, numbered from one to thirty inclusive, as it became due, and secure the payment thereof by their bond for that amount, secured by a mortgage of real estate in and near the city of Aurora.

And the defendant avers that the said Cobbs were able to comply with said agreement, and had a bond and mortgage prepared, signed, sealed, and acknowledged preparatory to its being delivered upon the obtaining of said stock certificates, which were to be issued in sums of one thousand dollars each, and each was to have an indorsement of a lien of the amount of the corresponding bond which was given in payment therefor for one thouand dollars
5 in favor of the city, and of the bondholders, and the right of substitution of the latter as aforesaid, which said arrangement was well known to the said railroad company and to its directors.

And the defendant avers that a like arrangement was made by the city council with one Hiram L. Dean, who was able to comply with the same for the sale of ten thousand dollars of the said stock to him upon precisely the same terms, and by which he was also to secure the payment of the said bonds from 31 to 40 inclusive, by a lien on said stock, and by bond and mortgage, which were prepared, signed, sealed, and acknowledged for that purpose, which said arrangement was well known to the railroad company and to its directors.

And the defendant avers that a like arrangement, in all its particulars, was made by the city council with one Townsend J. Taylor, who was then able to comply with the same, for the sale of ten thou-

sand dollars of said stock to them upon precisely the same terms, and by which he was to secure the payment of bonds, numbered from 41 to 50 inclusive, given in payment of said stock, and by bond and mortgage, which were prepared, signed, and sealed, and acknowledged for that purpose, which said arrangement was known to the said railroad company and to its directors.

And the defendant avers that the city bonds set out in the complaint were prepared, signed, and sealed in order to carry
6 out the said arrangements; and said John Cobb was by the city council authorized to take them to the city of Cincinnati, Ohio, where the office of said railroad was kept, and there, upon the receipt of the said stock, to deliver the same to the said railroad company.

And the defendant avers that one Solomon P. Turny, without any authority from the city or city council, took the said bonds and the said coupons thereto attached to the said city, and there left the same in the safe of the said railroad company, against the protest of said Cobb, until the said stock certificate could be issued and delivered to the said Cobb, the thirty thousand dollars for himself and Oliver P. Cobb; ten thousand dollars for said Hirman L. Dean, and ten thousand dollars for the said Taylor, under and in fulfilment of said agreements, which it was understood was to be done immediately, or so soon as the certificates could be made out, which could not have taken more than a day or two; that, at that time, the said railroad stock was selling in the market at par, and was well worth that price in the market, and so continued for some time thereafter, for a time more than sufficient for the making the said certificates as aforesaid.

And the defendant avers that the said railroad company was, by usage and by the 18th section of the city charter, to deliver the said stock certificates in sums as aforesaid, and that such certificates were the usual and ordinary evidence of title to such stock, and necessary for the enjoyment of the rights of stockholders in said company.

7 And the defendant avers that the said Turny, as mayor of the city, afterwards frequently demanded the said stock certificates of the said railroad company, that the said city bonds might be delivered, and the said certificates delivered to the said Cobbs, the said Taylor, and Dean, but the said railroad company wholly neglected and refused to deliver the same as they have been requested, and never have delivered the same to this day; but on or about the day of , 18 , when the said stock had become greatly reduced in value, and was rapidly going down in the market and public estimation, and had become reduced in value to less than fifty per cent. of the par value thereof, the said railroad company caused one certificate of stock for thirty thousand dollars to be issued in the name of the city of Aurora, with an indorsement written in red ink across the face thereof, in these words, to wit: "This stock, with four hundred other shares of the same stock, making in the aggregate one thousand shares, is subject to the lien of holders of certain bonds for one thousand dollars each, numbered from one to fifty, issued by the

quested by a resolution of the directors of the Ohio and Mississippi Railroad Company, of which said West was one, and in which resolutions he joined, to deliver her bonds in payment of a subsciption of $50,000 of stock which one John D. Haynes, as mayor of said city had subscribed in the year 1850; that said railroad bonds were not then due under the said subscriptions; that the city council refused to give said bonds, unless the city would first sell and dispose of the stock which the council then supposed the city had subscribed for; that after various negotiations an arrangement was made by the city council with John Cobb, a director of said railroad company, and Oliver Cobb, by which they were to purchase $30,000 of the said stock, subject to the lien of the corresponding bondholders for the payment of $30,000 of the said bonds given in payment of the said stock and subject to the right of substitution of the bond-
4 holders for the corresponding stock at any time before a declaration of cash dividends should be made by the said railroad company, and also subject to the lien of the city upon the said stock for the payment of the same sum; that this arrangement was to be carried out by the issuing the said stock in certificates of one thousand dollars each, upon the face of which the said lien to the corresponding bondholder and said city for one thousand dollars of bonds, and said right of substitution was to be indorsed, and the said city council were to make a transfer of the said stock, and procure the certificates thereof, thus indorsed, and deliver them to the said Cobb, and the said Cobbs were thereupon to assume the payment of the interest upon the $30,000 of bonds named in the complaint, numbered from one to thirty inclusive, as it became due, and secure the payment thereof by their bond for that amount, secured by a mortgage of real estate in and near the city of Aurora.

And the defendant avers that the said Cobbs were able to comply with said agreement, and had a bond and mortgage prepared, signed, sealed, and acknowledged preparatory to its being delivered upon the obtaining of said stock certificates, which were to be issued in sums of one thousand dollars each, and each was to have an indorsement of a lien of the amount of the corresponding bond which was given in payment therefor for one thouand dollars
5 in favor of the city, and of the bondholders, and the right of substitution of the latter as aforesaid, which said arrangement was well known to the said railroad company and to its directors.

And the defendant avers that a like arrangement was made by the city council with one Hiram L. Dean, who was able to comply with the same for the sale of ten thousand dollars of the said stock to him upon precisely the same terms, and by which he was also to secure the payment of the said bonds from 31 to 40 inclusive, by a lien on said stock, and by bond and mortgage, which were prepared, signed, sealed, and acknowledged for that purpose, which said arrangement was well known to the railroad company and to its directors.

And the defendant avers that a like arrangement, in all its particulars, was made by the city council with one Townsend J. Taylor, who was then able to comply with the same, for the sale of ten thou-

sand dollars of said stock to them upon precisely the same terms, and by which he was to secure the payment of bonds, numbered from 41 to 50 inclusive, given in payment of said stock, and by bond and mortgage, which were prepared, signed, and sealed, and acknowledged for that purpose, which said arrangement was known to the said railroad company and to its directors.

And the defendant avers that the city bonds set out in the complaint were prepared, signed, and sealed in order to carry
6 out the said arrangements; and said John Cobb was by the city council authorized to take them to the city of Cincinnati, Ohio, where the office of said railroad was kept, and there, upon the receipt of the said stock, to deliver the same to the said railroad company.

And the defendant avers that one Solomon P. Turny, without any authority from the city or city council, took the said bonds and the said coupons thereto attached to the said city, and there left the same in the safe of the said railroad company, against the protest of said Cobb, until the said stock certificate could be issued and delivered to the said Cobb, the thirty thousand dollars for himself and Oliver P. Cobb; ten thousand dollars for said Hirman L. Dean, and ten thousand dollars for the said Taylor, under and in fulfilment of said agreements, which it was understood was to be done immediately, or so soon as the certificates could be made out, which could not have taken more than a day or two; that, at that time, the said railroad stock was selling in the market at par, and was well worth that price in the market, and so continued for some time thereafter, for a time more than sufficient for the making the said certificates as aforesaid.

And the defendant avers that the said railroad company was, by usage and by the 18th section of the city charter, to deliver the said stock certificates in sums as aforesaid, and that such certificates were the usual and ordinary evidence of title to such stock, and necessary for the enjoyment of the rights of stockholders in said company.

7 And the defendant avers that the said Turny, as mayor of the city, afterwards frequently demanded the said stock certificates of the said railroad company, that the said city bonds might be delivered, and the said certificates delivered to the said Cobbs, the said Taylor, and Dean, but the said railroad company wholly neglected and refused to deliver the same as they have been requested, and never have delivered the same to this day; but on or about the day of , 18 , when the said stock had become greatly reduced in value, and was rapidly going down in the market and public estimation, and had become reduced in value to less than fifty per cent. of the par value thereof, the said railroad company caused one certificate of stock for thirty thousand dollars to be issued in the name of the city of Aurora, with an indorsement written in red ink across the face thereof, in these words, to wit: "This stock, with four hundred other shares of the same stock, making in the aggregate one thousand shares, is subject to the lien of holders of certain bonds for one thousand dollars each, numbered from one to fifty, issued by the

said city of Aurora to the said Ohio and Mississippi Railroad Company, dated January 1st, 1852, and all other conditions and stipulations in reference thereto stated in such bonds;" and did also issue another like certificate for ten thousand dollars in the name of the city of Aurora, with an indorsement written in red ink across the
8 face of it in these words, to wit: "This stock, with eight hundred other shares of same stock, making, in the aggregate, one thousand shares, is subject to the lien of the holders of certain bonds for one thousand dollars each, numbered from one to fifty, issued by the said city of Aurora to the said Ohio and Mississippi Railroad Company, dated January 1st, 1852, and all other conditions and stipulations stated in said bonds." And that said railroad company did also issue another certificate precisely like the last with the same indorsement in red ink written across the face thereof.

And the defendant avers that the said indorsement was not in accordance with the provision of the 18th section of the city charter of the city of Aurora authorizing such subscription of stock and the issuing of bonds to raise money to pay the same, and wholly and entirely destroyed the value of such stock for the purposes for which it was issued; that the said Turney, claiming to act as mayor, had no authority to receive the same, and objected to those indorsements and the issue of the said stock in that way, but not being able to obtain the same in any other manner, was induced to take the same to see if he could not induce the said Cobbs and the said Dean and Taylor to receive the same in fulfilment of their said agreements; that the said parties, each and all of them, wholly refused to receive the same or have anything to do with it. Whereupon the same was returned to the said railroad company and cancelled, and no
9 stock has ever since issued for or in place of the same, nor were the said city bonds ever delivered to the said railroad company, or intended to be, until the said certificates of stock made out and delivered to the said city, nor did the said city ever intend to deliver the same unless the said stock certificates were made out and delivered when worth near par, nor unless the same were so made and delivered in such manner as that they should be delivered to the said Cobbs, the said Dean, and Taylor in accordance with and in fulfilment of said agreement and sale and purchase made between them and the city council. And the defendant further avers that the said railroad stock very soon thereafter became wholly worthless, and of no value whatsoever. And the defendant avers that the said railroad company, by its neglect and refusal to make and deliver the said stock at the several times when it was demanded, and when it was at its par value and near that, and by the manner of issuing the same, as aforesaid, wholly destroyed its value, and prevented the defendant from selling the same, or having any advantage or benefit thereof.

And the defendant further avers that during all the time the said Charles W. West, one of the plaintiffs, and the partner of the other plaintiff, was one of the directors of the said railroad company, and one of its executive and finance committee, and had, when he obtained possession of the said bonds, notice that they had not been

delivered, and that the conditions upon which they were to
10 have been delivered had not been complied with, and in law and equity he and his said partner Torrence, the plaintiff, have no right to enforce the same against this defendant. Yet the defendant avers that the said West and Torrence have sued them in the circuit court of the United States for the district of Indiana on such coupons since this suit was brought, and threaten to sue her again, and so often as any interest on said bonds become due that they will sue the defendant for the same.

And defendant avers that said bonds are payable to bearer, and have several years to run before they become due, and that the plaintiffs may transfer the said bonds to fifty different persons, and the coupons to others in other States, and who would have no knowledge of these facts, and who would therefore stand in a better position to prosecute the same against her, and she may be harassed thereby by a multiplicity of suits, and she may also lose her witnesses by lapse of time, and be thereby left remediless. The defendant therefore prays that the said plaintiffs may be enjoined from further proceeding in any suit upon said coupons or bonds which has been brought since this suit was brought, or from bringing any further or other suits thereon, or from transferring any of the said bonds or coupons to any person or persons, or corporation, and that on final hearing
11 the said bonds may be declared void and delivered up to the defendant.

9th. And, for a further answer to the said complaint, the defendant says that the Ohio and Mississippi railroad was not a chartered company for making a road or roads to the said city of Aurora, or for doing any other act or thing relating to the said city, and that on the day of September, 1850, when John D. Haynes, mayor of the city of Aurora, by direction of the city council of said city, made the subscription of fifty thousand dollars to the capital stock of said railroad company, the said railroad was not located to or through the said city, nor was the said railroad company engaged in the construction of a railroad to, through, or from the said city, or required so to do by their act of incorporation, or by any law of Indiana, as is set out in the second paragraph of the answer, nor had the said railroad company at any time before said subscription was made been engaged in making a railroad, or any other road to, through, or from the city, but the said railroad company was incorporated by an act of the legislature of Indiana which took effect on the 14th of February, 1848, entitled an act to incorporate the Ohio and Mississippi Railroad Company; and by the 13th section of said act the said company was authorized to survey, locate, and construct a railroad on the most direct and practicable route between Lawrenceburg on the Ohio river and Vincennes on the Wabash river, having in view the interest
12 of said company and the convenience of the citizens of the State of Indiana, and extend the same westwardly on the like most direct and practicable route through the State of Illinois to the city of St. Louis, in the State of Missouri. And the said railroad company was not authorized to construct any other road. And the

defendants aver that no location of the said railroad to, through, or from Aurora was made on or before the 6th day of July, 1852; that the location was then fixed by a resolution of the board of directors sitting in Cincinnati, Ohio, and of which Chas. W. West was one, and no previous or other location of the said railroad was made to or through the city of Aurora until the said road was constructed; that at that time the general office of said company was in Cincinnati, Ohio, and had been since 1850, and all elections of directors, and all affairs of said company were held and kept in said city last named.

And the defendants aver that no vote of the qualified voters of the city of Aurora was ever taken at any annual election in or by which the said voters were called upon to signify their assent thereto by expressing on their ticket that they were in favor of such subscription of stock by the city council to or in the said railroad company subsequent to the location of said road to the city of Aurora, nor was any vote ever taken upon the subjects but one on the first Monday in April, 1849. And the defendant, therefore, avers that the city council had no right or lawful authority to make the said subscrip-
13 tion of stock at the time they did make the same, and that said subscription is and was void, and that the city council had no authority or power to issue the bonds of the city in question in payment therefor, and that the said bonds and coupons sued upon in this action are void. And the defendants aver that Charles W. West, one of the plaintiffs, and the partner of the other, was, when the location of the said railroad was made and when the said bonds and coupons were issued, a director of the said railroad company, and one of the executive and finance committee thereof, and had notice of all these facts, and that he has no right to enforce the same against the defendants. But the defendant avers that the plaintiffs have sued them in the circuit court of the United States for the district of Indiana on such coupons since this suit was brought, and threaten to sue them again and again, and so often as any interest on said bonds becomes due that they will sue the defendant for the same. And the defendant avers that said bonds are payable to bearer, and have several years to run before they become due, and that the plaintiffs may transfer the said bonds to fifty different persons, and the coupons to others in other States, and who would have no knowledge of those facts, and who would therefore stand in a better position to prosecute the same against them; and the defendants fear that unless enjoined from so doing, the plaintiffs will so transfer them, and they may be therefore harassed by a multiplicity of suits, and they may also lose their witnesses by lapse of time, and be also thereby left remediless. The defendant therefore prays that the plaintiff be enjoined from further
prosecuting any suit or suits upon said bonds or coupons
14 against them commenced since the bringing of this suit, or from bringing any other suit or suits upon the same, or from transferring or disposing of any of the said bonds or coupons to any person or persons, corporation or corporations, and that on final hearing the said bonds be declared void and ordered to be delivered up to the defendant.

10th. And, for further answer to the said complaint, the defendants say that at the time of the subscription of stock by the said John D. Haynes, as mayor of the city of Aurora, by direction of the said council, as set out in the last answer to the said complaint, and at the time the said bonds came into the possession of the said Ohio and Mississippi Railroad Company, as set out in the eighth answer to said complaint above set forth, the same were prepared, signed, and sealed for the purpose of paying for the said $50,000 of stock for the Ohio and Mississippi Railroad Company, which the said Haynes had subscribed as aforesaid, and the said bonds, with all coupons attached thereto, were taken to Cincinnati and came into the possession of the said railroad company, as is set out in the 8th answer to the said complaint, and the said railraad company were thereby bound, if they used the bonds and coupons aforesaid, and should have at once made out and delivered the certificates of stock in such form and sum as the said city of Aurora desired, and so that they should conform to the requirements of the 18th section of the city charter, under and by virtue of which alone the city could subscribe for stocks, or issue bonds to raise the means to pay for the same.

And the defendant avers that the said certificates of stock were the usual and ordinary evidences of the title of the same, and
15 are necessary for the enjoyment of the rights of stockholders in the said company.

The defendant further avers that the said Ohio and Mississippi Railroad Company, though often requested so to do by the mayor of the city of Aurora, neglected and refused to issue any certificates of stock whatsoever, until the same was of a value of less than fifty per cent. of its par value, and then wholly refused to issue the same as requested to do by said mayor, or to issue the same in accordance with the provision of said 18th section of the city charter as is set out in said eighth answer. And the defendant further avers that at the time when their mayor subscribed to the said stock, and at the time the said bonds and coupons were prepared and left with the said railroad company, the said Ohio and Mississippi railroad stock was of the par value thereof, and that by the gross carelessness, negligent and reckless manner in which the said railroad company conducted and managed the affairs of the said company, the said stock became of very little value before the said railroad company would make out any certificates of stock and issue the same in any manner or form, and soon thereafter the same became wholly worthless by and because of such carelessness and gross and negligent management. And the defendant avers that the said Charles W. West, one of the plaintiffs, and the partner of the other, became a director in 1850 of the said railroad company, and so continued until May 10, 1856, when the said stock had became worthless, and was, at the time said bonds were left with said company, as set out
16 in the 8th answer aforesaid, one of the executive and finance committee of said company, and aided in and was fully cognizant of the management of said railroad company, and concurred

therein, and during all the time that he was a director as aforesaid had full notice of all the facts and things herein set out

And defendant avers that the plaintiffs have no right to hold the said bonds and coupons against her, and that they are void in their hands.

Defendant further avers that the said bonds are payable to bearer in the city and State of New York, and will pass from hand to hand by delivery, and that the plaintiffs may, and she fears they will, unless enjoined from so doing, sell and dispose of the same to other parties or corporations out of the State of Indiana, who will stand in a better position to prosecute the same than are the plaintiffs, and that her rights and defence may thereby be lost or greatly endangered, and she harassed by a multiplicity of suits.

The defendant therefore prays that the plaintiffs may be enjoined from further prosecuting any suit or suits on these bonds or bonds, or coupons or coupons, which has commenced this suit was commenced, or from bringing any other or further suits thereon, or from selling or transferring the same or any part thereof to any person or persons, corporation or corporations; and that, upon final hearing, the said bonds may be declared void, and ordered to be delivered up to
17 the defendant

T. D. LINCOLN,
J. SULLIVAN,
HOLMAN & HAYNES.
Attorneys for the City of Aurora.

STATE OF INDIANA, *Dearborn county, sct:*

Before me, the undersigned, clerk of the Dearborn circuit court, personally came Basil N. McHenry, of the city of Aurora, in the county and State aforesaid, who, being by me duly sworn, says that the foregoing paragraphs of the answer of the city of Aurora to the complaint in the above-entitled cause, and the matters and things therein set forth, are true in substance and matter of fact, as he verily believes, and further saith not.

B. N. McHENRY.

Subscribed and sworn to before me on this 1st day of November, 1864.

JOHN F. CHEEK, *Clerk.*

And on the 4th day of November, 1864, the following notice of a motion for an injunction was filed in said court, to wit:

In the Dearborn circuit court, civil action.

STATE OF INDIANA, *Dearborn county*:

WEST & TORRENCE
v.
THE CITY OF AURORA.

The said plaintiffs are notified that on Friday, the 11th day of
18 November, 1864, as soon as the same can be heard by the court

on said day, the said defendant will move the said Dearborn circuit court, now in session at the court-house, in the city of Lawrenceburgh, in said county, where said cause is pending, for a temporary injunction during the continuance and pendency of said action, or restraining order in conformity with the prayer of 8th, 9th, and 10th paragraphs of the defendant's answer, and for such other temporary injunction in said cause as the case presented shall justify; of which you will please take notice. Nov. 4, 1864.

T. D. LINCOLN,
J. SULLIVAN,
HOLMAN & HAYNES,
Att'ys for the City of Aurora.

A copy of the above served on me Nov. 4, 1864.

A. BROWER.

And on the 11 day of November, 1864, being the 11th judicial day of the November term of said Dearborn circuit court, the following proceedings were had in said cause, to wit:

WEST & TORRENCE
vs.
THE CITY OF AURORA. } Civil action.

The said plaintiffs, West & Florence, come now and discontinue their suit herein against said defendant, the City of Aurora, at their own proper costs.

And afterwards, on the same day the *the* following proceed-
19 ings were had in said cause, to wit:

WEST & TORRENCE
v.
CITY OF AURORA.

Now come West Lawrence, by their attorneys, and file a petition supported by affidavit, whereon to found a motion hereon, to wit:

In the circuit court of Dearborn county, Indiana.

THE CITY OF AURORA
ads.
CHARLES W. WEST and JOSEPH TORRENCE.

The said Charles W. West & Joseph Torrence, come and represent to the said court that on the 31st day of October, 1861, said city of Aurora filed in the said court in the action on that day pending in said court, entitled Charles W. West and Joseph Torrence, partners, and pl't'ffs against said city of Aurora and the Ohio and Mississippi Railroad Company as defendants certain three additional paragraphs or amendments to the original answer of said city in the case last mentioned, numbered respectively 8, 9, and 10, which are now on file, and by which said city of Aurora claims against these petitioners, Charles W. West and Joseph Torrence, a decree of this court can-

celling and ordering to be delivered up to said city of Aurora the said 50 bonds for $1,000 each of said city, mentioned in said additional and amended answer or counter claim. Said West & Torrence further say, that on the 11th day of November, 1864, they did dismiss their said action against the said city of Aurora and said railroad company, at their own proper cost; and that the said claim and cause of action and relief of said city of Aurora against these petitioners, now defendants, does still remain in said court in the same manner as if originally instituted against them and to the same effect. And now these petitioners, West & Torrence, state to and inform and represent to this court that they are both and each of them residents and citizens of Cincinnati, in the State of Ohio; and that the said city of Aurora is a corporate body, situated and located as a municipal corporation in the county of Dearborn and State of Indiana; and that the said matter in dispute to wit., the said 50 bonds for $1,000 each, exceeds the sum of five hundred dollars, exclusive of costs, all of which said West & Torrence are ready to make appear to the satisfaction of this court; and said Charles W. West and Joseph Torrence, now and at the time of and before entering their appearance to said counter claim and cause of action and complaint of said city of Aurora, so as aforesaid filed against them on the said 31st day of October, 1864, petition the said court for the removal of the said cause arising under and out of said counter claim and complaint for trial unto the next circuit court of the United States, to be held in in the district of Indiana, where said suit is pending, copies of said cause of action and complaint against them, and the notice for an injunction served upon said West & Torrence under the same, and also for their appearing and entering their own appearance in said circuit court to said action against them. And they now tender a bond, with Samuel L. Jones as surety, conditioned for such removal and entering of their appearance, and ask this court to order said cause to be removed, in accordance with the statute of the United States in such case made and provided.

CHARLES W. WEST and
JOSEPH TORRENCE,
By A. BROWER, *their Att'y.*

INDIANA, *Dearborn county:*

Abram Brower, agent of said Charles W. West and Joseph Torrence, being by me first duly sworn, says the facts set forth in the foregoing petition are true.

A. BROWER.

Subscribed and sworn to before me Nov. 11, 1864.
JOHN F. CHEEK, *Clerk.*

And also file the affidavits of Abram Brower, jr., and John F. Cheek, in relation to an entry made upon the order-book of this court, on the 5 day of the present term. [Here insert said affidavits.] And thereupon move the court that the matters in controversy herein be transferred for adjudication to the circuit court of the United

States for the State of Indiana. And William S. Holman, attorney for the city of Aurora, files affidavits of himself and said John F. Cheek. [Here insert.] And the court having heard argument of counsel of the parties, and not being sufficiently advised, take the said motion under advisement, and day is given.

And afterwards, to wit, on the 18th day of November, 1864, being the 17th judicial day of the October term of said Dearborn circuit court, in the year aforesaid, the following proceedings were had in said cause, to wit:

CHARLES W. WEST and JOSEPH TORRENCE
ads.
THE CITY OF AURORA.

Charles W. West and Joseph Torrence, above named parties to the above-entitled action, having filed herein a petition for the removal of the matter put in controversy by the counter claim of the city of Aurora, above named party to the said action, for trial to the circuit court of the United States for the district of Indiana; and it being made appear to the satisfaction of the court that the said West and Torrence are citizens of the State of Ohio, and were at the time of the filing of said counter claim, and that the said city of Aurora
23 is incorporated by and located in the State of Indiana, and that the matters so in dispute exceed the sum of ($500) five hundred dollars, and that the said petition was properly filed by the said West & Torrence, and that the said West & Torrence have offered good security, as contemplated by the act of Congress for such purposes enacted, and done all other things necessary for the granting of their said petition, it is therefore ordered that the said security be, and the same hereby is, accepted and approved by the court. And it is further ordered that there be no further proceedings in this court as to the said matter so put in controversy.

To which ruling, opinion, and judgment of the court the said city of Aurora, at the time, excepted, and prays an appeal to the supreme court of the State of Indiana.

STATE OF INDIANA, *Dearborn county, sct:*

I, John F. Cheek, clerk of the Dearborn circuit court, do hereby certify that the above and foregoing transcript contains a full and true copy: 1st, of the amended answer filed in said matter. 2d, of the notice of motion for an injunction, with the acknowledgment of service thereon; also of the entry on the order-book of said court of the dismissal by West & Torrence of their action against the city of Aurora; also of the entry of the motion for the removal of said action of the city of Aurora against said West & Torrence
24 into the United States circuit court, with a copy of their petition filed for that purpose; also of the entry ordering the removal of the cause to said United States circuit court for trial; all of which I certify to be full, true, and complete copies of the originals thereof as fully as the same remain of record in said court.

In witness whereof, I have hereunto subscribed my name and affixed the seal of said court at Lawrenceburg, this 17th day of December, 186 .

[SEAL.] JOHN F. CHEEK, *Clerk.*

And afterwards, to wit, at a circuit court of the United States for the district of Indiana, begun, holden, and continued at the court-house, in the city of Indianapolis, on the 17th day of May, 1865, before the honorable David Davis, an associate justice of the Supreme Court of the United States and the honorable David McDonald, judge of the district court of the United States for the district of Indiana, comes T. D. Lincoln, esquire, of counsel for the defendant, and enters a special appearance to this action, and now files on behalf of the defendant a motion in writing, to wit:

Circuit court of the United States for the district of Indiana.

CHARLES WEST and JOSEPH TORRENCE
v.
THE CITY OF AURORA.

And now comes the city of Aurora, by her counsel, Messrs.
25 Holman, Lincoln, and Sullivan, and make a special appearance for the purpose of disposing of this motion, and moves the court to dismiss the case from this court, and send it back to the circuit court of Dearborn county, Indiana, from which it came, for the following reasons:

First. That but a partial record is brought here, the most important portions thereof not being made part of the transcript filed.

Second. That the transcript sent here does not purport to contain the complaint and first seven parapraphs of the answer, and that the said transcript contains no such papers or portions of the record to enable this court to understand or adjudicate upon the matters involved in the said suit.

Third. That the bond required to be given upon the removal of the case is not sent up with the transcript or contained therein.

Fourth. That West and Torrence, then being citizens of Ohio, commenced this suit in the Dearborn circuit court of Indiana, and thus, as such citizens, submitted themselves to the jurisdiction of that court, as will appear by the record of the case.

Fifth. That the record of the case shows that West & Torrence appeared in the suit and took action therein after the amended paragraphs were filed, before they made their application to have the case remanded to this court.

26 Sixth. The case and the parties therein are not such as that this court can take jurisdiction of the same.

HOLMAN, LINCOLN, and SULLIVAN,
Attorneys, &c.

And day is given.

And afterwards, to wit, at a circuit court of the United States for the district of Indiana begun, holden, and continued as aforesaid, on the 23d day of May, 1865, before the honorable judges aforesaid—

Now comes the said defendant, by William S. Holman, esq., her attorney, and now files an affidavit herein which is in the words and figures following, to wit: (Affidavit not on file among the papers.)

And day is given, &c.

And afterwards, to wit, at a circuit court of the United States for the district of Indiana begun, holden, and continued as aforesaid, on the 2d day of June, 1865, before the honorable judges aforesaid—

Now come the parties, by their respective attorneys, and the motion heretofore made to remand this cause to the Dearborn circuit court is sustained.

It is therefore considered that this cause be and the same is hereby remanded to said Dearborn circuit court.

And afterwards, to wit, at a circuit court of the United States for the district of Indiana begun, holden, and continued as aforesaid, on the 7th day of June, 1865, before the honorable judges aforesaid—

27 Come now the plaintiffs, by counsel, and file their bill of exceptions herein, which is in the words and figures following, to wit:

In the circuit court of the United States for the district of Indiana.

THE CITY OF AURORA
v.
CHARLES W. WEST and JOSEPH TORRENCE.

Be it remembered that, on the 17th day of May, 1865, the plaintiff the city of Aurora, in open court, by motion in writing, moved said court to remand said cause to the Dearborn circuit court, which said motion in writing is in the words following, to wit:

In the circuit court of the United States for the district of Indiana.

CHARLES W. WEST and JOSEPH TORRENCE
v.
THE CITY OF AURORA.

And now comes the city of Aurora, by her counsel, Messrs. Holman, Lincoln, and Sullivan, and makes a special appearance for the purpose of disposing of this motion only, and moves the court to dismiss the case from this court and send it back to the circuit court of Dearborn county, Indiana, from which it came, for the following reasons:

First. That but a partial record is brought here, the most important portions therof not being made part of the transcript filed.

28 Second. That the transcript sent here does not purport to contain the complaint and first seven paragraphs of the answer, and that the said tr nscript contains no such papers or portions of the record as to enable this court to understand or adjudicate upon the matters involved in the said suit.

Third. That the bond required to be given upon the removal of the case is not sent up with the transcript or contained therein.

Fourth. That West & Torrence, then being citizens of Ohio, commenced said suit in the Dearborn circuit court of Indiana, and thus, as such citizens, submitted themselves to the jurisdiction of that court, as will appear by the record of the case.

Fifth. That the record of the case shows that West & Torrence appeared in the suit and took action therein after the amended paragraphs were filed, before they made their application to have the case remanded to this court.

Sixth. The case, and the parties therein, are not such as that this court can take jurisdiction of the same.

HOLMAN, LINCOLN, and SULLIVAN, *Attorneys, &c.*

And did file with said motion the affidavit of William S. Holman.

And the court having considered said motion, and being fully advised in the premises, did sustain said motion upon the ground
29 alleged in the fourth and sixth reasons aforesaid in support of said motion, and did order that said cause be remanded to said Dearborn circuit court; to which opinion and judgment of the court sustaining said motion and ordering said cause to be remanded to said Dearborn circuit court, the defendant at the time excepted, and he prays that this bill of exception may be signed and sealed and made part of the record, which is done accordingly.

D. DAVIS. [SEAL.]

30 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the district of Indiana, in the eighth judicial circuit of the United States, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you, between the city of Aurora, plaintiff, and Charles W. West and Joseph Torrence, defendants, a manifest error hath happened, to the great damage of the said Charles W. West and Joseph Torrence, as by their complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf; you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday in December next, in the said Supreme Court,
31 to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this sixth day of June, in the year of our Lord one thousand eight hundred and sixty-five, and of the independence of the United States the eighty-ninth.

[SEAL.] J. D. HOWLAND,
Clerk of the U. S. Circuit Court, Dis. of Indiana.

[50 cent rev. stamp.]

32 UNITED STATES OF AMERICA, *ss:*

To the city of Aurora, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eighth circuit and district of Indiana, wherein Charles W. West and Joseph Torrence are plaintiffs, and you are defendant in error, to show cause, if any there be, why the judgment in said suit mentioned should not be corrected, and speedy justice done to the parties in that behalf.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 14th day of September, in the year of our Lord 1865.

DAVID DAVIS,
One of the Judges of the Circuit Court aforesaid.

33 UNITED STATES OF AMERICA,
District of Indiana, Circuit Court, ss:

I, John D. Howland, clerk of the circuit court of the United States within and for the 8th judicial circuit and district of Indiana, do hereby certify that the foregoing is a true and complete copy of the record and proceedings in the above-entitled cause, as also the writ of error and the citation, as appears of record in my office.

In testimony whereof, I hereto subscribe my name and affix the seal of said circuit court, at my office, in the city of Indianapolis, this eighteenth day of October, A. D. 1865.

JOHN D. HOWLAND, *Clerk.*

Filed December 3, 1865.

SUPREME COURT OF THE UNITED STATES.

CHARLES W. WEST, *et al*,
vs.
THE CITY OF AURORA,

In Error to the U. S. Circuit Court for the District of Indiana.

Brief for the Plaintiffs.

THOS. G. MITCHELL, COUNSEL FOR PLAINTIFFS.

Stanage, Saunders & Co. Print, Cincinnati.

SUPREME COURT OF THE UNITED STATES.

CHARLES W. WEST, *et al*,
vs.
THE CITY OF AURORA,

In Error to the U. S. Circuit Court for the District of Indiana.

Brief for the Plaintiffs.

The record in this case presents but a single question, for the decision of the Court; and that question is a very simple one.

The Plaintiffs in error, Charles W. West and Joseph Torrence, as it appears, had, at some time prior to October 31, 1864. commenced an action in the Circuit Court of Dearborn Couny, Indiana, against the Defendant in error; the City of Aurora, on coupons of certain bonds, issued by that City, and held by the Plaintiffs. On that day, the action being already at issue, the Defendant filed therein "three additional paragraphs," by way of amendment to her answer; each of which concluded with a prayer for an injunction, restraining the Plaintiffs from transferring, and from bringing suits upon, any of the bonds or coupons referred to, and for a decree on final hearing, declaring the bonds and coupons void, and directing them to be delivered up for cancellation. *Printed Record* 1, 5, 6, 8. *Original Record* 2, 10, 14, 16.

A notice, that the Defendant, would move for an injunction, as thus prayed for, was served upon the Attorney for the Plaintiffs, November 4, 1864. And thereupon, November 11, 1864, the Plaintiffs discontinued their action, and filed a petition, supported by affidavit, for the removal of the matters, put in controversy by the "additional paragraphs" of the answer, for trial in the U. S. Circuit Court for the District of Indiana. *Printed Record* 8, 9, 10. *Original Record* 18, 19, 20, 21.

The Court granted this petition; and being satisfied, that the Plaintiffs were at the time when the amended answers were filed, and still remained, citizens of the State of Ohio, and that the Defendant was incorporated by, and located within, the State of Indiana, and that the matter in dispute exceeded the sum of five hundred dollars, and that the Plaintiffs had done all that was required of them, accepted the security which had been tendered, and ordered that no farther proceedings, as to the matters thus put in issue, should be had in that tribunal. *Printed Record* 11, *Original Record* 22, 23.

The Plaintiffs having duly filed a transcript of the proceedings already referred to, including copies of the amended answers, the notice of a motion for an injunction, the acknowledgement of the service of that notice, the prayer for removal to the Circuit Court of the United States, and the finding and orders of the Dearborn Circuit Court, directing the removal of the cause, the Defendant moved the United States Circuit Court, to dismiss the action and remand it to the State Court, for trial, assigning six different reasons for the motion. *Printed Record* 12. *Original Record* 24, 25, 26.

The U. S. Circuit Court sustained this motion, because of

the *fourth* and *sixth* reasons assigned; which were as follows:

"Fourth, That West and Torrence, then being citizens of Ohio, commenced said suit in the Dearborn Circuit Court of Indiana, and thus, as such citizens, submitted themselves to the jurisdiction of that Court, as will appear by the record of the case." and

"Sixth, The case and the parties therein are not such, as that this Court can take jurisdiction of the same."

And to this the Plaintiffs excepted, and their exceptions were allowed and made part of the record." *Printed Record* 13, 14. *Original Record* 27, 28, 29

The only point, to be decided is, whether the Circuit Court of the United States, for the District of Indiana, erred in remanding the case to the Dearborn County Circuit Court; or, which is substantially the same question, whether the latter Court was justified in certifying the case to the former one, for trial.

It was insisted, in the Court below, and will probably now be claimed, that the application of the plaintiffs to have the cause removed, was not made *at the time of entering their appearance;* and that there was no *averment* in their petition for removal, that they were citizens of Ohio, *at the time, when the additional answers were filed;* and that only an *incomplete record*, of the proceedings in the State Court had been filed. But as it appears from the record, that the Plaintiffs for the first time after the filing of the additional paragraphs of the answer, appeared, only to discontinue their action, and *on the same day*, filed their petition for the removal of the cause; and as the act of Congress does not require any averment, *in the petition*, of the citizenship of the Plaintiffs, and as the Dearborn Circuit Court found as matter of fact, that the Plaintiffs were not only at the date of the removal, but *at*

the time of the filing of said counter claim, citizens of Ohio, and that they had offered good security as contemplated by the act of Congress, for such purposes enacted, and "done *all other things*, necessary for the granting of their said petition," which finding can not now be called in question; and as the record filed is quite complete enough for the purpose intended, that is, to enable the clerk of the United States Circuit Court to docket the cause; and as the latter Court specially based its decision upon the *fourth* and *sixth* reasons assigned, it will hardly be necessary to enter into any detailed examination of the positions thus assumed by the Defendant. *Printed Record* 9, 11, 14. *Original Record* 19, 20, 22, 23, 28, 29.

It is unnecessary to cite authorities in support of the elementary proposition, that the findings of a Court can not be reviewed by proceedings in error, unless all the testimony supporting them is incorporated into the record. And it will be perceived, that in this instance the Circuit Court of the United States did not undertake to call in question the correctness of the finding, that the Plaintiffs had done *all things necessary* for the removal of the cause; but based its action exclusively upon the grounds, that the Plaintiffs, by bringing their action originally in the State Court, had submitted themselves to its jurisdiction, and that the case and the parties were not such as to enable the United States Court to take jurisdiction of them.

The only questions to be examined, then, are *firstly*, whether the case, made by the "additional paragraphs" of the Defendant's answer, is within the scope of the act of Congress regulating this matter, and *secondly*, whether the provision of that act, requiring copies of the *process* against the Plaintiffs to be filed, was sufficiently complied with, by

filing copies of the amended answers, and of the notice of a motion for an injunction served upon them.

I. If the action, originally brought by the Plaintiffs had been assumpsit, or debt, or covenant; and the Defendant had then filed a bill in chancery seeking to enjoin the transfer of the bonds, and the prosecution of any suit upon them, and to procure a decree for their cancellation, no one, it is to be presumed, would doubt, that the Plaintiffs would have had a right to have that chancery cause transferred to the United States Court for hearing. The 12th section of the judiciary act is broad enough to cover *any* suit in a State court, brought by a citizen of that State against a citizen of another. And in the case supposed, the pendency of an action at law, growing out of the same subject matter brought by the Plaintiffs in a State Court would not affect their statutory rights in the latter proceeding, where they were Defendants. As to this, I do not understand, that there is any controversy.

It is said, however, that the "additional paragraphs" filed by way of amendment to the answer of the present Defendant, do not constitute a new or an independent action, but that they are merely *equitable defenses* to the original action, with an *incidental* prayer for relief. And it is therefore insisted that they are only *portions* of a case.

Prior to the enactment of the Indiana code of civil proceedure, these "additional paragraphs" of the answer would have been only pleas; and they could not have been accompanied by any *prayer*. The Defendant might have plead specially the matters set forth in them; but, if desiring affirmative relief, would have had to resort to an independent proceeding. And in that event, the Plaintiffs would have had an unquestioned right to discontinue their action

at law, and to have the chancery cause transferred for trial to the United States Court.

It is, however, provided in that code that the "Defendant may set forth in his answer as many grounds of *defense*, *counter claim* and *set off* as he may have"; and that if the Plaintiff, after the filing of a counter claim, shall discontinue his action, the counter claim shall be proceeded upon without notice. 2. *Gavin and Herd's Statutes*, 91, 216.

And so it is contended that the Plaintiffs in this proceeding could not, by the dismissal of their action, get rid of a controversy with the Defendant in the Dearborn Circuit Court, because the "additional paragraphs" of the answer were *counter claims;* and yet that they can not have the issues, tendered by these counter claims, removed for trial in the United States Court, because there was no suit commenced by the Defendant against the Plaintiffs.

I insist that this is an unreasonable interpretation of the laws governing the rights of these parties. The code of Indiana, like the codes of many other States, was designed simply to change the mode of *proceedure*. And the act of Congress was intended to secure a substantial *right*. Under the code of Indiana, "a counter claim is any matter arising out of or connected with the cause of action, which might be the subject of an action in favor of the Defendant." And when the proceeding, in which such a claim has been asserted, is dismissed, and the claim is left pending, it is as much a suit, brought by the Defendant, against the Plaintiff, as if it were a cross action at law, or an independent bill in equity.

If the allegations of these "additional paragraphs" were mere matters of defense, not amounting to a "counter claim," under the laws of Indiana, then they were disposed of finally, when the Plaintiffs discontinued their action;

and the Circuit Court of the United States should not have remanded a cause for trial, in which there was nothing to try. If, on the other hand, they constituted a counter claim, so as to leave the issues tendered by them, to be subsequently disposed of, then they were, from the date of the discontinuance, to all intents and purposes, a cross action, commenced by the Defendant against the Plaintiffs. So long as the original action was pending, they were merely incidental to it; but under the Indiana code, as soon as the original petition was withdrawn, they became an independent action, by the Defendants, in which the Plaintiffs were compelled to appear, without notice.

II. At the time when the Judiciary act of 1789 was passed, there was no such thing as a code of civil proceedure existing in this country; and in every cause, at law or in chancery, the Defendant was brought into court by *process*. It was natural, therefore, that when a Defendant procured a case to be certified from a State Court, he should be required to file in the latter a copy of the "process" served upon him. But it will be observed, that the principal end to be secured was, that he should *enter his appearance*, and that the copy of the process was simply to enable the cause to be properly placed upon the docket.

If it had been provided in any State, after the passage of this Judiciary act, that in an ordinary common law action the Defendant should be brought within the jurisdiction of a court, by oral notice from an officer, without the service of any writ, this Court would hardly have been disposed to hold, that he was thus deprived of his rights, to a trial in a court of the United States. And yet such would necessarily have been the decision, if the filing of a copy of the process should be deemed indispensable.

The present case is very closely analogous to the one just

put by way of illustration. The Plaintiffs having actual notice of the filing of a counter claim by the Defendant, when they discontinued their own action, as they had a right to do, were at once, under the legislation of Indiana, again in Court, as Defendants, the same as if they had been duly served with process. And if the counter claim is to be regarded, after the original action was dismissed, as an independent suit, then the filing of copies of the "additional paragraphs," with notice of which the Plaintiffs were chargeable, and of the notice served upon them, of the motion for an injunction was all that was either possible or necessary to be done.

It is altogether unnecessary for this Court to enquire, whether at the time, when the Plaintiffs brought their action in the Dearborn Circuit Court, "there were supposed to be some advantages to them in commencing the suit in the State court," or whether subsequently "new facts had come to light," in reference to their possession of the bonds," or whether any "fact appeared in the affidavit referred to in the transcript, but which is not a part of it," or whether there was "evidence offered upon the motion to remove," in reference to the citizenship of the Plaintiffs, or whether the Plaintiffs once testified "in their own behalf," and "got a judgment in the Dearborn Circuit Court on their own evidence," and "now fear the result before the Supreme Court of Indiana." The suggestion of these matters, by the counsel for the Defendant, as if they were proper subjects for consideration in this case, sufficiently indicates, why he would prefer to litigate all the branches of the existing controversy, in some other form. But this Court, I am convinced, will examine the case, only as it appears of record.

The Plaintiffs, it sufficiently appears, desired to litigate in the United States Court, rather than in the Circuit Court of Dearborn county. And they manifested that wish, by discontinuing their action, and filing the petition for removal. But the reasons which operated upon them do not appear of record; and cannot affect the decision of this Court.

It now only remains for this Court to decide, whether the Dearborn Circuit Court correctly granted the relief which was sought.

And that question is cheerfully submitted.

THOS. G. MITCHELL,
Counsel for Plaintiffs.

Supreme Court of the United States,

DECEMBER TERM, 1867.

Charles W. West, et al.

versus

The City of Aurora.

Motion to dismiss for want of Jurisdiction.

Brief by T. D. LINCOLN,

Of Counsel for Defendant in Error.

Robert Clarke & Co., Printers, 65 West Fourth Street, Cincinnati.

Supreme Court of the United States,

DECEMBER TERM, 1867.

Charles W. West, et al.

versus

The City of Aurora.

Motion to dismiss for want of Jurisdiction.

THE record in this case presents but an unintelligible fragment of the suit to which it relates; and from anything there is in it, nothing can be learned of the matter in controversy in the action. The suit was commenced on the twenty-sixth day of April, 1861, in the Dearborn Circuit Court, for the State of Indiana, by West and Torrence. They were, at the time they commenced the suit, citizens and residents of the State of Ohio, and could, therefore, have brought the suit in the Circuit Court of the United States for the District of Indiana. But at that time there were supposed to be some advantages to them in commencing the suit in the State Court, inasmuch as the Code of Indiana, under which it was commenced, permitted the parties to testify; and as the *bona fides* of the possession by West and Torrence, of the bonds

in question, was denied by the City of Aurora, it was important for the plaintiffs that they be able to testify in the case. At that time, Judge McLean held that the parties to a suit could not testify in their own behalf, though they were permitted so to do by the local law; and he had, both in the Ohio and in the Indiana Districts, made a rule of Court excluding them from being witnesses. This fact is known to this Court, for the reason that several of the judgments obtained in said Courts before him, came before this Court, and were reversed.

Vance *v.* Campbell, 1 Black. 427.
Hausskuecht *v.* Claypool, et al., 1 Black. 431.
Wright *v.* Bales, 2 Black. 537.
Ryan *v.* Bindley, 1 Wallace, 68.

The suit was brought upon the past due coupons of certain bonds claimed to have been issued by the City of Aurora, in payment of stock, which it was claimed that the City had subscribed in and to the Ohio and Mississippi Railroad Company. West and Torrence obtained judgment in the Dearborn Circuit Court, and the City took the case to the Supreme Court of Indiana, where the judgment was reversed.

See City of Aurora *v.* West, 22 Ind. 88, 89.

In the meantime new facts had come to light in reference to West and Torrence's possession and title to these bonds, in another suit having relation to the same, between the City of Aurora and the Cobbs.

See the City of Aurora *v.* Cobb, 21 Ind. 494.

The case was sent back from the Supreme Court of Indiana, to the Dearborn Circuit Court, for further proceeding, where the City of Aurora was permitted to file additional defenses; and thereupon, on the 31st of October, 1864, she filed these three additional defenses, found in this record. These defenses set up, in substance, that the bonds were never in fact delivered to the Ohio

and Mississippi Railroad, and that West and Torrence knew the fact when they obtained them, and were not *bona fide* purchasers thereof; that the City received nothing for them; and inasmuch as the defense to the coupons in question was equally a defense to the bonds themselves, and to all the coupons; and inasmuch as the other coupons and bonds were not due, and were negotiable, and might therefore pass into the hands of hundreds of different persons, who would give value for the same, and who would have no knowledge of these facts, the defendants prayed that the plaintiffs might be enjoined from conveying or transferring any of the said fifty bonds, or any of the twenty undue coupons attached to each of the said bonds; and that, on final hearing, the bonds might be declared void, delivered up, and canceled.

Notice was given the counsel of West and Torrence of the application for an injunction, on the 4th of November, 1864 (which injunction has since been allowed), and on the 10th of November, the day on which the motion for an injunction was to have been heard, the plaintiffs discontinued (or tried to) their cause of action; and afterward on the same day, filed a petition for the removal of the cause to the Circuit Court of the United States for the District of Indiana.

The Dearborn Circuit Court allowed this petition, and removed the cause to the Circuit Court of the United States for the District of Indiana, where, at the next term of that Court, West and Torrence filed copies of these three additional defenses. with the notice of the motion for an injunction. They did not file any process served upon them, for there was none, but a copy of the notice for an injunction.

At the same term of the last named Court, the defendants appeared, and moved to dismiss the cause, and send it back to the Dearborn Circuit from which it came, for the reason that the Circuit Court of the United States had no jurisdiction of the case; and the defendants filed an affidavit showing, among other things, that the whole record of the proceedings in Dearborn Circuit, was

not sent up, and that there was proof therein, that West and Torrence were, at the time they commenced the suit in the Dearborn Circuit, citizens of Ohio. The Court will observe that the transcript sent up from the Dearborn Circuit, does not purport to send up any "process" served upon them, or all the proceedings in the case, and that there is nothing in the transcript that gives any idea of how the suit was commenced, or of what was involved in the suit except as it may be inferred from these defenses. *See Record, p.* 11.

The Circuit Court of the United States for Indiana dismissed the suit, and sent it back to the Dearborn Circuit Court. West and Torrence bring this writ of error.

POINTS.

We claim that this was not a case that could be removed from the Dearborn Circuit Court to the Circuit Court of the United States: that that Court had no jurisdiction of the case, and therefore that this Court has no jurisdiction of this writ of error.

I.

The 12th section of the Judiciary Act does not authorize the removal of such a case from a State Court to the Circuit Court of the United States. It does not authorize the removal of any suit by the plaintiffs, who have commenced the same in a State Court.

The statute only provides for the removal of suits by a *defendant* who is sued by a citizen of the State in which the suit is commenced.

See section 12 of the Judiciary Act, 1 Stat. at Large, p. 79.

West and Torrence were not defendants but the plaintiffs, who selected the State Court for the trial of the suit. Nor does the judiciary act authorize the removal of any suit by a *defendant*, in which he has voluntarily submitted himself to the jurisdiction of the State Court.

The plaintiffs, West and Torrence, did this by bringing their suit in the State Court, and prosecuting it there until they feared the result, and so long as it appeared advantageous for them to do so.

In bringing their suit in the Dearborn Circuit Court under the Code of Indiana, they thereby submitted themselves *to any and all remedies, proceedings, and defenses, which might properly be administered in that suit.*

By the Code of Indiana any equitable defense may be joined with a legal one, in the same suit; or an equitable defense may be pleaded to a legal claim, which is in the nature of bill to enjoin proceedings at law and to defeat the cause of action on equitable grounds; and at the same time an injunction may be granted in aid of such defense.

There is no longer any distinction between legal and equitable causes, or legal and equitable defenses; so that if, in a case like this, the defense to any past due coupon would be a defense to all undue coupons and to the bonds, it may be set up by way of answer, and the bonds and undue coupons declared void and ordered to be delivered up, to be canceled. The party may, in the mean time, as ancillary to his defense, get the aid of the Court, by injunction, restraining the plaintiff from disposing of the bonds and undue coupons.

Substantially this very thing was done by the Cobbs in the case of the City of Aurora against them, growing out of these very bonds, and upon the agreement of sale of the stock which is set up in these defenses.

See Cobb, et al. *v.* The City of Aurora, 21 Ind. 494.

It is in the nature of an equitable defense to the cause of action, set up in the petition.

See also Kemp *v.* Mackrell, 3 Atk. 812.
Cartwright *v.* Clark, 4 Met. Mass. 109, 110.
Wickliffe *v.* Clax, 1 Dana, 589.
3 Daniel's Ch. Pr. 17, 44.

These defenses, therefore, are not, in Indiana, a separate and distinct suit; but are what they purport to be, a defense to the cause of action, fit and proper to be administered in the suit.

II.

These defenses are not counter-claims, as they are styled in the petition to remove. They are simply defenses to the coupons proceeded upon, rendering them void, with the incidental aid of an injunction. They set up no claim or demand of the defendant growing out of the bonds or coupons, but a defense to them. And as this defense is equally a defense to the whole bond and coupons, there is a prayer that they may all be delivered up, in order to avoid other and further litigation of the same question. Precisely what might have been done under the old practice, by bill for this purpose, is now done under the Code of Indiana by way of answer.

A counter-claim is not simply a defense to the action. It calls for some judgment of the Court in favor of the defendant, upon

some matter growing out of the same covenant, agreement, or cause of action, upon which the plaintiff is proceeding, and upon which the defendant might have sued the plaintiff; as, for instance, upon an independent covenant in the same instrument. which has been broken. It differs from a set-off, inasmuch as that arises out of a separate and distinct agreement resulting in a debt, and upon which a judgment may be had. It is like a recoupment in this, that it grows out of the same instrument or transaction, but differs from a recoupment in that a party can only recoup to the extent of the plaintiff's claim, and he loses the balance.

Sickles *v.* Patterson, 14 Wend. 257.

Whereas, in a counter-claim, he may, as in set-off, obtain a judgment in his favor for a balance.

The counter-claim under some of the Codes may be defined somewhat broader, as in the New York Code.

But there can be no mistaking its meaning under the Indiana Code, for it is very distinctly and clearly defined therein.

SECTION LIX.

"A counter-claim is any matter arising out of or connected with the cause of action, which might be the subject of an action in favor of the defendant, or which would tend to reduce the plaintiff's claim or demand for damages."

2 Gavin & Hord's Stat. p. 91.

Very much the same definition is given in the Ohio Code, SECTION XCIV.

2 Swan & Critchf. 979

It is thus described in the case of Conner *v.* Winton, 7 Ind. 523, in the opinion of the Court.

A counter-claim is that which might have arisen out of, or could have had some connection with, the original transaction, in view

of the parties, and which, at the time the contract was made, they could have intended might, in some event, give one party a claim against the other for compliance or non-compliance with its provision."

Clearly, the City of Aurora set up no claim against West and Torrence growing out of these bonds, which, at the time the bonds were issued, they could have intended, would, in any event, give the City of Aurora a claim against West and Torrence.

These additional defenses, so called, are defenses simply to the coupons. They aver that the City never delivered the bonds to the Ohio and Mississippi Railroad Company, and that West and Torrence had notice of this fact when they obtained them; that they are void as against the City, and should be so declared; this was a good defense to the coupons and bonds.

The City of Aurora *v.* Cobb, et al., 21 Ind. 494.
Warner *v.* Sweet, 11 Foster, 332.
Cook *v.* Brown, 34 N. H. 460.

III.

I do not know that it is important for the defendants in error to establish that these defenses are not a counter-claim. They are so styled in the petition to remove the case from the Dearborn Circuit Court to the Circuit Court of the United States, in order to give some pretense or show of argument that the City of Aurora is a plaintiff as to these defenses, and West and Torrence defendants. This is the only object there can be in speaking of these defenses as a counter-claim.

But the Code of Indiana settles this question.

SECTION LVI is in these words:

"The answer shall contain,

"*First.* A denial of each allegation of the complaint controverted by the defendant, or of any knowledge or information thereof, sufficient to form a belief.

"*Second.* A statement of any new matter constituting a defense, counter-claim, or set-off, in plain and concise language, without repetition.

"*Third. The defendant may set forth in his answer as many grounds of defense, counter-claim, and set-off, whether legal or equitable, as he shall have.* Each shall be distinctly stated in a separate paragraph, and numbered, and clearly refer to the cause of action intended to be answered."

If these defenses were, therefore, a counter-claim, they are nevertheless means of defense of the *defendant* in the *suit;* and because they are filed by the City of Aurora to the suit brought by West and Torrence in the Dearborn Circuit Court of Indiana, are not a separate suit in which the City of Aurora became a plaintiff, and West and Torrence defendants; and the latter are not, therefore, entitled to have the cause removed from the State Court under the 12th section of the Judiciary Act.

If a counter-claim, they are still a defense which the defendant is authorized to make in the suit, and do not, therefore, make the City of Aurora a *plaintiff*, instituting a suit against West and Torrence, in Indiana.

A set-off is a separate cause of action, but when brought into a suit already commenced, it is a claim permitted to be set up in the same cause to reduce or defeat the plaintiff's cause of action. There may be many causes of action, as there may be several defendants in the same suit. In this case, there were precisely two hundred causes of action in the plaintiff's petition, one upon each coupon. *See the Record in the City of Aurora* v. *West, pp.* 71 *to* 171 *inclusive*, No. 91 on the Docket, where this petition is found. It is still one and the same suit, in which both of the parties have

submitted themselves to the jurisdiction of the Court, and can not, therefore, be heard to say that prejudice may result to them because they happen to be citizens or residents of the State in which the suit is commenced.

When West and Torrence, who were then citizens and residents of the State of Ohio, brought this suit under the Code of Indiana in the Dearborn Circuit Court, they voluntarily submitted themselves to the jurisdiction of that Court, for any defense or remedies which the City of Aurora could properly set up in that suit; and as all the defenses, legal or equitable, including counter-claims and set-offs, are proper defenses in any suit under the Indiana Code for the *defendant*, the plaintiff, who has brought her into the State Court, can not, because he fears he is to be beaten in the State Court, withdraw his cause of action, and then have the *defense* removed to the Circuit Court of the United States.

Whether we consider the defenses as equitable defenses simply, with incidental relief founded upon the facts constituting the defense, or as counter-claims, or set-offs, they are, nevertheless, a part of the same suit. West and Torrence, therefore, who, while citizens and residents of Ohio, instituted this suit, under the Code of Indiana in the Dearborn Circuit Court, could not afterward remove it, or any part of it, to the Circuit Court of the United States for the District of Indiana.

IV.

The removal of these additional defenses, from the Circuit Court of the United States, presents a most singular proceeding.

As has been intimated, there was no process issued by the defendants to bring West and Torrence into Court. They had volun-

tarily come there, and had been litigating in that Court, for some years, and took a judgment therein in this very case.

But what is it that they remove? Not a case, but a defense; and when that defense is examined, it is found to refer to the pleadings which have preceded it, and to be wholly unintelligible without the petition which the plaintiff filed in the Dearborn Circuit Court.

The Court will find that there was nothing in the record that could be heard, or which brings up any "process" served upon the plaintiffs, for there was none.

The whole framework of the 12th section of the Judiciary Act shows that this proceeding is irregular, and did not give the Circuit Court jurisdiction. It provides:

"That if a suit be commenced in any State Court against an alien, or by a citizen of the State in which the suit is brought, against a citizen of another State, * * *
* * * * * * * *
and the defendant shall, *at the time of entering his appearance*, file his petition for the renewal of the cause for trial in the next Circuit Court, * * * * *
and offer good and sufficient surety for his entering appearance in such State Court, on the first day of its session, copies of said process against him, * * * * *
* * * * * * * *
it shall be the duty of the State Court to accept the surety and proceed no further in the cause."

Now this *suit* was not *commenced* by a citizen of Indiana against West and Torrence, but by them against the City of Aurora.

V.

West and Torrence did not, when they entered their appearance in the suit, file their petition for the removal of the cause. Their

appearance in the suit had long before been entered, and they had actually obtained a judgment, which had been taken to the Supreme Court of Indiana, and there reversed. This fact appeared in the affidavit referred to in the transcript sent the Court, but which is not a part of it. It also appears in the case of the *City of Aurora* v. *West*, 22 *Ind.* 89, and appears in the transcript sent to this Court, in the case of the *City of Aurora* v. *West*, No. 91 upon the Docket of this term, and which has been before referred to.

VI.

If the filing of these additional defenses by leave of Court in the suit thus prosecuted by West and Torrence, could be regarded as the *commencement of a suit* against West and Torrence, still they were not entitled to a removal for the reason that they did not, upon entering their appearance, file a petition to remove, but on the contrary appeared therein and dismissed their suit, or tried to do so, and after that filed their petition to remove the cause. In other words, they took action in the suit before filing their petition, and by that means deprived themselves of the right to remove. They appear in the Court to dismiss their cause of action. They know they can not remove the case unless they can get rid of all they had previously done in the suit, and they endeavored to dismiss their cause, which they do, so far as they can. This is taking action in the suit having direct reference to these additional defenses, and deprives them of their right to remove the case. These defenses were in the suit before they did this, and they therefore take action in the suit (if the defenses constituted one), before they file their petition to remove. Nor is their petition filed

upon entering their appearance, for there was no appearance at that time. Here, again, it appears that this case was no case for a removal.

VII.

But the petition for removal was not such as to entitle the defendants to a removal. The defendants did not aver therein that they were citizens and residents of Ohio when the suit was commenced, or at the time the additional defenses were filed. They aver that they were such at the time of filing their petition for removal, which was some twelve days after the time of filing these defenses. (See Record, p. 10.)

Now, this was not enough. They must have been such citizens and residents when the suit was commenced, or when the process was served upon them. As no process was served in this case, they must have been such at the time these defenses were filed by leave of Court.

Saving's Bank of Cincinnati *v.* Benton, 2 Met. Ky. 242.

Nor was there any evidence offered upon the motion to remove as to where they resided when the suit was commenced, or when these defenses were filed.

The petition therefore did not aver facts sufficient to entitle the plaintiffs to remove the cause even if the defenses referred to could be regarded as such.

VIII.

The order of the Dearborn Circuit Court removing the cause, was not binding upon the Circuit Court, or the parties, unless it was a proper case for removal. This is decided. See

Urtetiqui *v.* D'Arbel, et al., 9 Pet. 701, 702.

In that case, the Court say:

"It can not surely be in the power of the State Court to compel the United States Court to assume jurisdiction."

The question decided by the Circuit Court was also presented by the Supreme Court of Indiana, in this very case.

The Court say:

"It is the duty of the United States Court to remand the case to the State Court; and when so remanded, it will be the duty of the latter Court to proceed with the case."

The City of Aurora *v.* West, 25 Ind. 150.

At the time this question was before the Circuit Court, an argument was made to the effect that the Court should disregard the mode of proceeding under the Code of Indiana, which came with very bad grace from the plaintiffs, as they had commenced the suit under the Code, and prosecuted it to judgment, and so long as they thought it might be of advantage to them so to do.

The Courts of the United States, whether they like these Codes or not, must take them as they find them, in all cases removed

from the State Courts. They must administer the law relating thereto, as they find it administered in the State Courts. They can not make two suits out of one, or treat a defendant as a plaintiff, because, under the old system, he could not have set up his defense in the same suit. It was the very purpose of the Code of Indiana when it provided that a party might "set forth in his answer as many grounds of defense, counter-claim, or set-off, whether legal or equitable, as he shall have," to prevent this.

It is sometimes said (but I think generally by those who have never had any very great practice or knowledge upon the subject) that this mode of proceeding deprives the Courts of the benefit of the system of special pleading, which narrowed down the issue to a point, and presented that upon the record.

This is an error; for these Codes, properly administered, do that very thing. The party plaintiff is required to state his case in plain and concise language; and every fact well pleaded in the petition, and not denied under oath in the answer, is admitted of record. The defendant is required to set up his defense in like language, and every fact contained therein, and which is well pleaded, and not denied on oath in the reply, is also admitted of record; and so on, with any subsequent pleadings. And thus the precise matter in dispute comes upon the record for an issue in law, or fact, and the whole matter gets narrowed down to the real controversy, as under the old system of special pleading. This is indeed the essential or controlling element which runs through the mode of pleading under the Code of Ohio, which is very much like those of New York, Indiana, and Kentucky.

Take, for instance, an action of assumpsit upon a policy of insurance. It generally contained one or more special counts upon the policy itself, and the common counts for goods sold and delivered, and the money counts; and the plea was the general issue. The real cause of action intended to be litigated, might be a loss under the policy, or it might be for goods sold, or for money loaned, or had and received. The general issue may cover a defense that

the policy was never executed by the defendants—that the signatures of the officers are forged, or that policy has been altered; or, the defendant might, under the general issue, insist that the plaintiff did not own the property, or any interest in the same at the time of the loss; or, that the loss was occasioned by his fraudulent conduct; or, that after a loss within the perils he fraudulently permitted the same to become total, when but a comparatively small loss should have been sustained from the peril. None of this comes upon the record, by the old system, unless it is put there, after a trial, by means of a bill of exceptions; but under the Codes, the precise question in issue will be presented upon the record.

The parties being compelled to make oath to their pleadings, give notice what their own evidence is likely to be, and can not well spring a new case upon each other at the trial, it may be and often was, at the close of the trial, thus making a new trial necessary. Under the system of general pleading, prior to the Codes, such as was known in trover, under the Common Counts, and the general issue, nothing of the matter *in dispute* is contained in the pleadings, and the whole case is open for manly tussle, or for a general scramble and system of chaparral fighting, for the exercise of wits, upon points having often nothing to do with the merits of the case.

Under these Codes, as framed, if the case is incorrectly stated, as it shall appear upon trial, the party is permitted to amend on the spot, upon terms, if required, and another suit is not necessary, because of a variance, or because the plaintiff has mistaken his action.

I know it is a very general impression among the lawyers who have had a long and successful practice under the old system, that the new practice makes poor lawyers.

To my mind, nothing is more erroneous. There can be no forms, and therefore an ignorant man can not get along by the form books. He must be learned enough to know what facts en-

title him to a recovery; what to a defense; what are his remedies, and how to present them upon the record, so as to get them best before the Court and jury.

The old system undoubtedly tended to quickness and sharpness of practice, and gave the ready, often superficial lawyer a great advantage at *Nisi Prius*, in reference to these forms of action, etc., etc.

This very thing sometimes tended to pettifogging, and filled the books with useless learning, having no reference to the *real merits*. It made quick and ready lawyers, who appeared in fine dress, at the entrance of the Court; but whether it tended to make profound lawyers, I mean when compared with the new system, is a different question. And I risk little in saying, that the greater number of those who have had much practice under both systems, have come to the conclusion that it requires a much abler lawyer to plead well under the new system, than under the old: that the new gives the Court and party the great benefits of the system of special pleading, inasmuch as *all is special pleading*, and the general and indefinite issues known to the old system, and which had largely destroyed the system of special pleading as it originally was, are entirely unknown. The learned and profound lawyer has a greater advantage over the ignorant one under the new system than under the old. Indeed, in my opinion, no lawyer can successfully practice under the Code of Ohio, which is similar to the Indiana Code, unless he is familiar with the old system of special pleading, which the practice under these Codes much resembles, stripped of all that was merely technical or formal in it. I once stated this last idea to the late Judge Oliver Spencer, of the Superior Court of Cincinnati, who learned his pleading from Judge Gould (having heard his lectures from his own lips), and he assented to it.

None of the legal distinctions, or principles, known under the old system are abolished, or changed under the Codes, but simply the *form or mode of presenting the case*. The new system looks